

**Exhibit 8 –
City Attorney Memo –
Opinion Regarding Rezoning, Nonconforming and
Takings**



CITY OF RIVERSIDE

INTEROFFICE MEMO



TO: Members of the Planning Commission

DATE: May 12, 2005

FROM: Kristi J. Smith
Deputy City Attorney

SUBJECT: OPINION REGARDING THE REZONING OF PROPERTIES IN CONNECTION WITH THE PROPOSED ZONING CODE 2005/NONCONFORMING USES AND TAKINGS; OUR FILE NO. CA 05-1046

During the course of our numerous public hearings for the new General Plan and Zoning Code, several issues keep arising and misstatements are being made regarding rezoning of property and nonconforming uses. I believe it is prudent that we clear up any misunderstandings. The repetitive issues that I see are:

ISSUES:

1. Does the rezoning of property amount to a taking?
2. Does the rezoning create a nonconforming use?
3. If a residential structure burns down or is otherwise destroyed more than 50%, are they prevented from rebuilding?
4. If a nonconforming use exists, will it prevent individuals from obtaining loans on their property?

ANSWER:

1. The rezoning of property does not amount to a taking.

The mere process of rezoning property does not amount to a taking. Adoption of a zoning ordinance which is not arbitrary and does not unduly restrict the use of private property is a permissible exercise of the police power. It does not amount to a taking even if the new zoning ordinance restricts the existing use of the affected properties. Further, just because a zoning ordinance has an impact on a property's value, the courts have held that such fluctuations in value are incidents of ownership and are not considered a taking in the constitutional sense. *Danforth v. United States* (1939) 308 U.S. 271, 285 and *Hansen Bros. Enters. v. Board of Supervisors* (1996) 12 Cal. 4th 533, 551.

What the court will look at is whether the zoning ordinance substantially advances a legitimate government interest or denies the owner economically viable use of their property. *Agins v. City of Tiburon* (1980) 447 U.S. 255, 260. Planning staff has articulated at the meetings, as well as in their staff reports, the reasoning behind the rezoning. The fact that some properties will become legally nonconforming does not amount to a taking. Remember, the owners will still have an economically viable use of their property, whether it be as a single family residence, a commercial structure or another commercial use.

2. Generally, the rezoning creates a legally nonconforming use.

Yes, if the use is no longer allowed with the rezoning. However if the use was legally established prior to the adoption of the new ordinance, then the use becomes legally nonconforming. What this means is that the established use can continue until that use has ceased for 180 days or more. In the case of single-family residential uses which have been discontinued for 180 days or more, that use may be re-established with a minor conditional use permit and the making of requisite findings. This is no different than the current zoning code.

3. A residential structure that burns down or is otherwise destroyed more than 50%, can rebuild with a MCUP.

The current code and the proposed code are the same in regard to the destruction of a structure by more than 50%. For single family residential structures, both versions allow for rebuilding subject to a minor conditional use permit and the making of specific findings.

4. Generally, individuals should be able to obtain loans on their property.

We contacted several and differing types of lenders. And of course, we received different answers. Yes, there are those lender who will not loan on legally nonconforming properties. But there are also those lenders who will. There are also lenders who will lend if the comps. support the value of the property and those who will lend if the City provides a re-build letter. So, the bottom line is that depending on the lender will depend if they will loan.

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I hope that the above helps to clarify the issues. If you have any questions, please feel free to contact me.

A handwritten signature in black ink, appearing to read "Kristi J. Smith". The signature is fluid and cursive, with the first name "Kristi" and last name "Smith" clearly distinguishable.

Kristi J. Smith
Deputy City Attorney